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No. 07-421

IN THE

Supreme Court of the United States

VILLAGE OF OLDE ST. ANDREWS, INC.;
WKB ASSOCIATES, INC.,

Petitioners,

v.

FAIR HOUSING COUNCIL, INC.;
CENTER FOR ACCESSIBLE LIVING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* NATIONAL MULTI HOUSING COUNCIL, ZOM, INC., POST PROPERTIES, INC., LIONS GABLES RESIDENTIAL TRUST, INC., AVALONBAY COMMUNITIES, INC., CAMDEN PROPERTY TRUST, THE LESSARD ARCHITECTURAL GROUP, INC., WOOD PARTNERS, NILES BOLTON ASSOCIATES, INC., AND HUMPHREY & PARTNERS ARCHITECTS IN SUPPORT OF THE PETITIONERS

RAFE PETERSEN
Counsel of Record
CHRISTOPHER HANBACK
ELIZABETH PHELPS
HOLLAND AND KNIGHT LLP
2099 Pennsylvania Ave, NW
Washington, D.C. 20006
(202) 955-3000

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to this Court's Rule 37.2(b), the parties listed below respectfully request leave of this Court to file a brief *amicus curiae* in support of Petitioners the Village of Olde St. Andrews, Inc., and WKB Associates, Inc. Written consent for *amicus* participation in this case was granted by Petitioners. Written consent was withheld by counsel of record for Respondent.

Amici are the National Multi Housing Council, ZOM, Inc., Post Properties, Inc., Lions Gables Residential Trust, Inc., Avalon Bay Communities Inc., Camden Property Trust, The Lessard Architectural Group, Inc., Wood Partners, Niles Bolton Associates, Inc., and Humphrey & Partners Architects.

The interest of *Amici* is further set forth in the Interest of the *Amicus Curiae* section of the proposed brief at pages 1-5. This is a question of exceptional importance to *Amici's* members, who plan, design, construct, own, and manage multifamily properties across the United States. *Amici* have been subject to a torrent of litigation concerning whether the apartment communities they designed, built, own or manage comply with the Fair Housing Act's ("FHA") requirements that certain apartment units be constructed as accessible to persons with disabilities.

First, *Amici's* brief demonstrates that if the Sixth Circuit's interpretation of the requirements for standing remains in place, *Amici* will continue to be subject to litigation that is based on no more than the "testing" of properties by litigious advocacy groups. In effect, such litigation is merely the product of these groups' desires to advance a broad interpretation of the FHA's requirements while lacking actual injury. Advocacy groups' ability to avoid the typically rigorous requirements of standing

imposes costly and unwarranted obligations on multifamily designers and builders. *Amici* discuss two significant decisions issued since Petitioners filed their Petition.

Second, *Amici* want to bring to the Court's attention the impact that the lower courts' conflicting interpretations of the FHA's statute of limitations has on the multi-family community. *Amici* are concerned that without guidance from this Court conclusively rejecting the application of the "continuing violation doctrine" in FHA design and construction cases, those subject to the FHA by virtue of having designed or constructed a building subject to the FHA will have absolutely no protection from the statute of limitations. This is contrary to the plain language of the FHA and is exactly what Congress sought to avoid in enacting a statute of limitations that is triggered by the completion of design or construction.

This *amicus curiae* brief will assist this Court in determining whether to grant *certiorari*, and in ultimately resolving this case to prevent improper litigation under the FHA given the limits of fundamental principles of standing and the statute of limitations. *Amici* respectfully urge that the Court review the Sixth Circuit's opinion.

DATED: November 28, 2007.

TABLE OF CONTENTS

Page (s)

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. THE APPLICATION OF *HAVENS* TO FHA DESIGN AND CONSTRUCTION CASES MUST BE CLARIFIED 7

II. ORGANIZATIONAL STANDING CANNOT BE ESTABLISHED UNLESS THE ORGANIZATION DEMONSTRATES AN INJURY IN FACT INDEPENDENT OF RESOURCES DIVERTED TO LITIGATION RELATED COSTS 9

A. An Alleged Injury Based on the Costs of Litigation Alone is Insufficient to Confer Standing Upon an Organization 10

B. An Alleged Injury Based Solely on the Costs of Pre-Litigation Investigation and Testing is Equally Insufficient to Confer Standing 11

C. The *Havens* Holding Related to Organizational Standing Must Be Clarified 12

III. THE STATUTE OF LIMITATIONS FOR FHA DESIGN AND CONSTRUCTION VIOLATIONS IS TRIGGERED BY THE COMPLETION OF THE DESIGN AND CONSTRUCTION AND THE CONTINUING VIOLATION DOCTRINE IS INAPPLICABLE TO TOLL THE LIMITATIONS PERIOD 13

A. The Statute of Limitations is Triggered by the Completion of Design and Construction as Indicated by the Date of the Last Certificate of Occupancy. 13

B. Many Courts Inappropriately Rely on *Havens* as Grounds for Applying the Continuing Violation Doctrine to FHA Design and Construction Violation Claims 15

C. Applying the Continuing Violation Doctrine to FHA Design and Construction Violations Will Render the Statute of Limitations Meaningless 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page (s)

Cases

Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees, 19 F.3d 241 (5th Cir. 1994) 9, 10

Fair Employment Council of Greater Wash., Inc. v. BMC Mktg Corp., 28 F.3d 1268 (D.C. Cir. 1994) 10, 11

Fair Housing Council of Suburban Phila. v. Montgomery Newspapers, 141 F.3d 71 (3d Cir. 1998) 9

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. 528 U.S. 167 (2000) 10

Garcia v. Brockway, 503 F.3d 1092 (9th Cir. 2007) 14, 15, 17, 18

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) ..... *passim*

Hooker v. Weathers, 990 F.2d 913 (6th Cir. 1993) 9

Kuchmas v. Towson Univ., No. RDB 06-3281, 2007 WL 2694186 (D. Md. Sept. 10, 2007) 14, 16, 17

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 6, 10

Moseke v. Miller & Smith, Inc., 202 F. Supp. 2d 492 (E.D. Va. 2002) 12, 14, 16, 17

Nat'l Adver. Co. v. City of Raleigh,
947 F.2d 1158 (4th Cir. 1991) 17

Nat'l R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 18

Perez v. Laredo Junior College,
706 F.2d 731 (5th Cir. 1983) 17

Spann v. Colonial Vill., Inc.,
899 F.2d 24 (D.C. Cir. 1990) 9, 10

Thompson v. Mountain Peak Assocs., LLC,
No. 2:05-CV-145-BES-GWF, 2006 WL 1582126
(D. Nev. June 5, 2006) 14

Tobert v. Ohio Dep't of Transport,
172 F.3d 934 (6th Cir. 1999) 17

United States v. Hallmark Homes, Inc.,
No. CV01-432-N-EJL, 2003 WL 23219807
(D. Idaho Sept. 29, 2003) 15

United States v. Taigen & Sons, Inc.,
303 F. Supp. 2d 1129 (D. Idaho 2003) 14, 15

Vill. of Bellwood v. Dwivedi,
895 F.2d 1521 (7th Cir. 1990) 9

Walker v. City of Lakewood,
272 F.3d 1114 (9th Cir. 2001) 9

Codes & Statutes

42 U.S.C. § 812 7

42 U.S.C. § 3604(f)(1-2) 13

42 U.S.C. § 3604(f)(3)(C) ..... *passim*

42 U.S.C. § 3604(f)(4) 2

42 U.S.C. § 3604(f)(5)(C) 2

42 U.S.C. § 3612(a) (1982) 8

42 U.S.C. § 3613(a)(1)(A) 4, 7, 13

Other

U.S. Supreme Court Rule 37.6 1

H. Rep. No. 100-711 100th Cong., 2d Sess. 1998, reprinted in 1988 U.S.C.C.A.N. 2173, 2179 1

56 Fed. Reg. 9473 (Guidelines) (Mar. 6, 1991) 3

Design Manual, Transmittal Letter from HUD Secretary Cuomo (April, 1998) 3

INTEREST OF *AMICI CURIAE*

Collectively, the *Amici* represent a broad cross-section of both public and private companies that design, construct, own, and manage multi-family housing throughout the United States as well as the National Multi Housing Council, which is the voice of the multifamily industry.[1] *Amici* are directly affected by the issues presented in the Petition filed by Village of Olde St. Andrews, Inc., and WKB Associates, Inc.

The FHA makes it unlawful to "design and construct" covered multifamily dwellings "for first occupancy" after March 13, 1991, in a manner that makes them inaccessible to persons with disabilities. 42 U.S.C. § 3604(f)(3)(C). The FHA itself vaguely establishes what is required to make covered units accessible, by requiring the following elements: "accessible and usable" public areas; sufficiently wide doors; and "features of adaptive design" such as an "accessible route into and through the dwelling," placement of certain controls (e.g. light switches) "in accessible locations," reinforcements in walls for grab bars, and "usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space." 42 U.S.C. § 3604(f)(3)(C)(i)-(iii). In the words of Congress, these are "modest requirements" designed to "result[] in features which do not look unusual and will not add significant additional costs." H. Rep. No. 100-711 100th Cong., 2d Sess. 1998, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179

[1] Pursuant to Rule 37.6 of this Court, *Amici* states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *Amici* made a monetary contribution to its preparation.

("House Report"). Thus, the FHA sets out an imprecise mandate of accessibility and adaptability that is unlike, for example, a national building code. The lack of specificity under the FHA makes clear that Congress intended that design professionals and builders would retain flexibility in designing apartments, and could continue to achieve diversity in home design and construction while meeting the basic accessibility and adaptability requirements of the FHA. In enacting the FHA, Congress did not direct or empower the Department of Housing and Urban Development ("HUD") to promulgate binding regulations setting forth mandatory accessible design features. Rather, Congress empowered HUD only to issue reports and technical guidance concerning accessibility. 42 U.S.C. § 3604(f)(5)(C). Lacking authority to create mandatory design standards, HUD provided several examples of guidance documents and "safe harbors" that could be utilized to ensure compliance.[2] These safe harbors generally exceed the minimum requirements of the FHA and are at times contradictory.

Given that the FHA is vague, the law is unsettled as to exactly what is required of those engaged in the design and construction of multi-family residences to design a unit that is "accessible." Consequently, significant litigation is underway nationally by public interest advocacy groups

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[2] For instance, the FHA created an explicit "safe harbor" for meeting accessibility requirements, namely compliance with the American National Standards for buildings and facilities providing accessibility and usability for physically handicapped people ("ANSI A117.1"). 42 U.S.C. § 3604(f)(4).

seeking to expand the law beyond that which is required under the legislative history.

Petitioners' case is not unique. It has been *Amici's* experience that interest groups have filed a large number of suits against both individual apartment owners as well as large corporations with nationwide property portfolios alleging the buildings do not meet the FHA's requirements. These cases are built through "testing" of properties and allegations based on whether the apartment units are constructed in a manner consistent with the various "safe harbors." In a typical case, the testers measure the dimensions of kitchens and bathrooms and then compare such measurements to the dimensions discussed in HUD's Fair Housing Act Guidelines and Design Manual. Liability is alleged based on discrepancies between the measurements and the Guidelines and Design Manual despite the fact that both state unequivocally that they are neither binding nor mandatory. *See* 56 Fed. Reg. 9473 (Guidelines) (Mar. 6, 1991); Design Manual, Transmittal Letter from HUD Secretary Cuomo (April, 1998). No individuals with disabilities have any role in these cases.

For example, the Equal Rights Center ("ERC"), a Washington DC-based advocacy group has engaged in a "series" of lawsuits against residential apartment and condominium developers. According to the ERC's press releases, it has filed suit against at least seven developers, some of which own tens of thousands of apartment units in 20 or more states.[3] The suit filed by the ERC against *Amicus* Post Properties, Inc. alleges FHA violations at "more than 60

[3] *See* Equal Rights Center, Media Room, *at* http://www.equalrightscenter.org/index_files/Page319.htm (last visited November 27, 2007).

apartment complexes in 7 states, including more than 20,000 individual apartment units."[4]

To date, the lower courts have been reluctant to dismiss such suits for lack of standing, despite the fact that in many cases the plaintiffs' only theory of injury is that they utilized and diverted resources to "test" properties. This would allow, for example, a Washington-DC based group such as ERC to have standing to challenge the design of a building located in Texas even though the ERC provides no services in that state, has no members in that state and is unaware of any persons with disabilities that actually reside or sought to reside in that building. The "injury" is at best self-inflicted.

Equally troubling, some lower courts have been reluctant to interpret the FHA's statute of limitations based on the actual "termination" of the alleged discriminatory housing practice, 42 U.S.C. § 3613(a)(1)(A), choosing instead to adopt the "continuing violation" doctrine. Under this theory, as long as an apartment unit is out of compliance with the FHA (however that may be defined), the statute of limitations never tolls. The result is the statute of limitations is rendered a nullity and there is no repose for builders and designers. It has been Amici's experience that suits brought against designers, developers, owners, and managers of apartment communities are alleged to never be time-barred, even though the action leading to the alleged discriminatory conduct, i.e., the process of designing and constructing the building, took place many years ago. This exposes any party who had any

[4] *See* Equal Rights Center, Press Release: Post Properties, *at* http://www.equalrightscenter.org/index_files/Page3029.htm (last visited November 27, 2007).

interest in the design, construction or ownership of the building to the constant threat of litigation.

The end result of such interpretations of these important jurisdictional issues are lawsuits where the designers or builders of apartment communities must defend the compliance of every single property constructed after the FHA's date of enactment across the entire country. The discovery process alone requires expenditures of incredible resources and disruption of business (both to produce documents related to the design of buildings and to allow access to the building and the residences for expert inspections). The mere threat of the discovery process can lead to capitulation – resulting in monetary settlements as well as the requirement to undertake retrofits to make the buildings comply with many (but generally not all) of the design features set forth in the various "safe harbors" or guidelines discussed above. The ultimate cost of such settlements is wide ranging — from thousands to millions of dollars -- often dependent on the cost per unit of the retrofits.

Amici urges the Court to consider the question of whether advocacy groups with limited geographical missions and scope can demonstrate through testing alone the necessary injury to maintain suits of this breadth. Moreover, *Amici* requests the Court to settle the question of whether the continuing violation doctrine applies to toll the statute of limitations or the statute of limitations effectively time bars suits two years after the discrete acts of design and construction are completed.

SUMMARY OF THE ARGUMENT

As noted above, Petitioners are typical of companies who design and construct multi-family housing projects and have been sued by public interest groups because of alleged FHA design and construct violations. Petitioner WKB

Associates, Inc. ("WKB"), a residential development company based in Louisville, Kentucky, built three multifamily housing complexes in Jefferson County, Kentucky between 1993 and 2001. Pet. App. 8a. These complexes were the condominium developments Village of Olde St. Andrews, the Village of Deer Creek, and Greenhurst Condominiums. Pet. App. 8a.

Respondents Fair Housing Council and Center for Accessible Living are non-profit corporations concerned with housing discrimination issues, including accessibility for persons with disabilities. Pet. App. 8a. Respondents filed suit against Petitioners alleging that Petitioners engaged in disability discrimination in the design and construction of the three condominium developments. Pet. App. 7a. Respondents based their suit on an observation of steps leading up to the residences of Village of Olde St. Andrews and subsequent "testing" at the property by disabled individuals who did not reside there, but rather entered and inspected the property for FHA violations with no intent of living there. Pet. App. 9a.

Before the lower courts, Petitioners argued that Respondents lacked standing and that their claims were barred by the statute of limitations. Both the district court and the Sixth Circuit held that the Fair Housing Council had standing based on utilization of resources for litigation expenses and pre-litigation investigations. Pet. App. 9a, 26a. Additionally, the Sixth Circuit held that Respondents' claims were not barred by the statute of limitations because the continuing violation doctrine applied to toll the limitations period until the very last condominium unit was sold at Petitioners' properties. Pet. App. 33a.

This Court's review of the Sixth Circuit decision is necessary because the Sixth Circuit's holding conflicts with those of other circuit and district courts. And, these other courts' holdings are more consistent with this Court's past standing precedent, *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 563 (1992), and give greater effect to the plain language of the FHA's statute of

limitations, *see* 42 U.S.C. § 3613(a)(1)(A). An organization such as a non-profit advocacy group should not be able to establish an injury sufficient to confer standing when that organization has demonstrated no injury independent of testing and litigation costs. An injury based on resources utilized on litigation related expenses, including pre-litigation investigation and testing, is self-inflicted; it is neither concrete and particularized nor fairly traceable to any act of the designer or owner of the building. Additionally, the acts of design and construction are discrete acts that terminate when the design or construction is completed. At that point, the discriminatory act, if any, has taken place and the statute of limitations is therefore triggered. The continuing violation doctrine has no application to section 3604(f)(3)(C) of the FHA.

ARGUMENT

I. THE APPLICATION OF *HAVENS* TO FHA DESIGN AND CONSTRUCTION CASES MUST BE CLARIFIED.

The Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), has been relied upon to varying degrees as a basis for decisions regarding organizational standing and the interpretation of the statute of limitations in cases alleging FHA section 3604(f)(3)(C) violations. *Havens*, although an FHA case, is not a design and construction violation case. Instead, the Court in *Havens* discussed racial steering, a discriminatory practice significantly different from design and construction, especially in terms of the discriminatory act that triggers the statute of limitations. In addition, the discussion of organizational standing in *Havens* is broadly worded and must be clarified for cases in which the only alleged injury is resources utilized for or diverted to litigation.

In *Havens*, the plaintiffs—individuals and an organization—brought an action against an owner of an apartment complex, alleging that the owner practiced racial steering. *Havens*, 455 U.S. at 366. The *Havens* Court considered the standing of the organization as well as the then-current statute of limitations provision. *Id.*

As to standing, the Court held that "the sole requirement for standing to sue under § 812 [of the FHA] is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendants' actions he has suffered a 'distinct and palpable injury.'" *Havens*, 455 U.S. at 372. The Court found that the organization had demonstrated standing, and thus an injury in fact, because it sufficiently alleged that the defendant's racial steering practices had "perceptively impaired [the organization's] ability to provide counseling and referral services," and that this impairment constituted a "concrete and demonstrable injury." *Id.*, at 379.

Regarding the statute of limitations, the Court held that the continuing violation doctrine applied to the organization's claims: "Where a plaintiff pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." *Havens*, 455 U.S. at 380-81 (citing the then-current statute of limitations provision, 42 U.S.C. § 3612(a) (1982)). The Court further reasoned that the plaintiff's claims were "based not solely on isolated incidents involving the two respondents, but on a continuing violation manifested in a number of incidents-including at least one . . . that is asserted to have occurred within the 180-day period." *Havens*, 455 U.S. at 381.

These holdings in *Havens* have been used and interpreted in conflicting ways by courts considering allegations of FHA design and construction violations brought by organizational plaintiffs. It is important for this Court to settle such conflicts and to provide guidance considering the effect misinterpretation of that precedent

has on the rash of Section 3604(f)(3)(C) litigation currently before lower courts.

II. ORGANIZATIONAL STANDING CANNOT BE ESTABLISHED UNLESS THE ORGANIZATION DEMONSTRATES AN INJURY IN FACT INDEPENDENT OF RESOURCES DIVERTED TO LITIGATION RELATED COSTS.

Several courts, including the Sixth Circuit, have misinterpreted the language of *Havens* to allow standing of advocacy groups that have failed to demonstrate the requisite impairment to their activities and/or diversion of resources beyond the litigation they are pursuing. *See* Pet. App. 26a; *see also Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990). For example, the Sixth Circuit citing *Havens* along with Sixth Circuit precedent, held that pre-litigation investigation expenses are sufficient to confer standing. Pet. App. 15a, 20a (citing *Havens*, 455 U.S. at 378; *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993)). Specifically, the Fair Housing Council's allegations of incurring monetary pre-litigation expenses and lost opportunity costs associated with the investigation, which included training and deploying testers, was considered sufficient injury in light of *Havens*.

In contrast, various other courts, including the D.C. Circuit, the Fifth Circuit, the Third Circuit, and the Ninth Circuit, have held that an organization must allege and demonstrate an injury that is separate from and independent of litigation costs. *See, e.g., Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990); *Fair Housing Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 79 (3d. Cir. 1998); *Ass'n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994); *Walker v. City of Lakewood*, 272 F.3d 1114, 1124, n.3 (9th Cir. 2001). This is clearly the correct interpretation of "injury"

in light of this Court's other precedents related to organizational standing.

A. An Alleged Injury Based on the Costs of Litigation Alone is Insufficient to Confer Standing Upon an Organization.

In determining organizational standing, a court conducts the "same inquiry as in the case of an individual" to ensure that the organization has a "personal stake in the outcome of the controversy." *Havens*, 455 U.S. at 378. Thus, the organization must sufficiently allege and demonstrate that it has suffered an injury in fact that is concrete and particularized as well as actual and imminent. *Lujan*, 504 U.S. at 560. In addition, the organization must show that its alleged injury is "fairly traceable to the challenged action of the defendant." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000)

Generally, in FHA design and construction cases, the organizational plaintiff alleges as an injury frustration of its mission and diversion of resources as opposed to actual injury to members. For example, Respondent Fair Housing Council alleged that it directed resources toward training and employing testers to investigate the Village of Olde St. Andrews. Pet. App. 26a. However, the time and money that an organization spends in bringing a suit against a defendant does not and should not constitute an injury in fact for standing purposes. *See Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994). In other words, "an organization cannot . . . manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit." *Spann*, 899 F.2d at 27. As the Fifth Circuit has explained, the reasoning for this rule is that an organization has "no legally protected interest in not expending their resources on behalf of individuals for whom they are advocates, at least where the only resources 'lost' are the legal costs of a particular advocacy lawsuit." *Ass'n for Retarded Citizens*, 19 F.3d at 244.

B. An Alleged Injury Based Solely on the Costs of Pre-Litigation Investigation and Testing is Equally Insufficient to Confer Standing.

There are numerous cases where there is no individual plaintiff alleging discrimination from the construction or design of an apartment. In such cases (including the Sixth Circuit's decision) an organization has simply made a unilateral decision to undertake investigation and testing. The Sixth Circuit held that regardless of how the organization learned of Petitioners' alleged discriminatory acts, "any action [the organization] takes in combating that discrimination is fairly traceable to the defendant's discriminatory acts." Pet. App. 25a. Yet, this holding is legally erroneous in that it clearly requires no showing of causation whatsoever.

The rationale regarding manufactured injury should be equally applicable to such pre-litigation investigation and testing. Any alleged injury based on the cost of testing does not result from the actions of the defendant but rather from the plaintiff's own budgetary choices; the alleged injury is "self-inflicted." *BMC Mktg.*, 28 F.3d at 1276. A court cannot reasonably hold that a defendant has injured a plaintiff merely because the plaintiff decided that its money ought to be spent on testing rather than on its other operations. If a court were to so hold, "the time and money that plaintiffs spend in bringing suit against a defendant would itself constitute sufficient 'injury in fact'" and "a circular position that would effectively abolish the requirement [of injury in fact] altogether" would result. *BMC Mktg.*, 28 F.3d at 1276.

This view of self-inflicted injury is consistent with *Havens*. "The Court [in *Havens*] did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted upon the organization's programs." *BMC Mktg.*, 28 F.3d at 1277. Where no individual plaintiff has made a specific complaint concerning the accessibility of a building and all there has

been is testing, the defendant has inflicted no actual injury on the membership organization's programs. It is the organization's independent choice to test properties and that alone should not be enough to confer standing.

C. The *Havens* Holding Related to Organizational Standing Must Be Clarified.

Given the conflicting interpretations of what must be alleged and demonstrated to establish organizational standing, it is important for this Court to clarify *Havens*. This Court should hold that for an organization to demonstrate a sufficient injury under the FHA, that organization must allege damages separate and apart from those caused by preparing for litigation itself. In other words, the organization must allege and demonstrate an additional impairment (besides litigation costs) to the organization's efforts against discrimination. *See, e.g., Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 499, n.8 (E.D. Va. 2002).

If this Court fails to so clarify *Havens*, the extensive litigation under Section 3604(f)(3)(C) will only continue. The readiness of some courts to erroneously find standing, even where there is no concrete injury fairly traceable to the defendant's actions, is being taken advantage of by organizations that have gone beyond the geographical scope of their mission and alleged violations at properties throughout the United States. These organizations (and their members) have not suffered a sufficient injury in fact as to properties inside of their community, much less those in far away states. These organizations have not alleged any injury to their members or to their missions such as counseling or education activities that is fairly traceable to alleged FHA violations at the properties; they have alleged only that the properties have been tested. Testing alone should not establish standing. This Court needs to clarify the issue of organizational standing for litigious advocacy groups and organizations before the requirement of standing is effectively extinguished altogether.

III. THE STATUTE OF LIMITATIONS FOR FHA DESIGN AND CONSTRUCTION VIOLATIONS IS TRIGGERED BY THE COMPLETION OF THE DESIGN AND CONSTRUCTION. THE CONTINUING VIOLATION DOCTRINE IS INAPPLICABLE TO SECTION 3604(f)(3)(C) OF THE FHA.

The governing statute of limitations for private FHA claims states: "An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). For design and construction violations pursuant to section 3604(f)(3)(C), this limitations provisions has been interpreted in a variety of ways, with the major differences being what is considered the triggering date for the limitations period and whether the continuing violation doctrine can be applied.

A. The Statute of Limitations is Triggered by the Completion of Design and Construction as Indicated by the Date of the Last Certificate of Occupancy.

A logical starting point for the Court's consideration of the applicability of the continuing violation doctrine is a decision on what constitutes the triggering event on which the statute of limitations begins to run. The relevant provision of the FHA states that the limitations period is triggered "after the occurrence or the termination of an alleged discriminatory housing practice," 42 U.S.C. § 3613(a)(1)(A). Accordingly, the first issue in this inquiry is what constitutes the discriminatory housing practice as related to a construction and design violation.

The Sixth Circuit interpreted the discriminatory housing practice to relate back to the general provision of 42 U.S.C. § 3604(f)(1-2), which makes it unlawful to "discriminate in the sale or rental, or otherwise make unavailable or deny a

dwelling to any buyer or renter." Pet. App. 29a. On that basis of availability, the Sixth Circuit held that the date of the last unit sold is the triggering date for the statue of limitations. Pet. App. 33a.[5]

However, other courts — including two decisions issued since Petitioners filed their Petition — have interpreted the discriminatory housing practice to relate back to section 3604(f)(3)(C); the provision making it a discriminatory act to fail to design and construct accessible dwellings. *Garcia v. Brockway*, 503 F.3d 1092, 1096 (9th Cir. 2007); *Kuchmas v. Towson Univ.*, No. RDB 06-3281, 2007 WL 2694186, *5 (D. Md. Sept. 10, 2007). *Garcia* held that the statute of limitations begins to run when the design and construction is completed. *Garcia*, 503 F.3d at 1096; *see also Moseke*, 202 F. Supp. 2d at 503; *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1144 (D. Idaho 2003); *Thompson v. Mountain Peak Assocs., LLC*, No. 2:05-CV-145-BES-GWF, 2006 WL 1582126, *2 (D. Nev. Jun2 5, 2006). This is a logical interpretation because the "alleged discriminatory housing practice," is the wrongful design and construction, which occur when such processes are complete. Hence, the actual discriminatory practice is the act of designing and constructing dwellings in violation of the requirements of the FHA, not making the unit unavailable. *Id.*

The date of completion for design and construction varies among properties and jurisdictions, but many courts, including *Garcia*, have found that issuance of a certificate of occupancy is the best indicator of the date of completion.

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[5] Although this is a firm deadline, it becomes confusing if a unit is resold and is of little help in the context of rental housing. One question the Sixth Circuit failed to address in holding that the date of sale is the triggering date for the statute of limitations, is whether the statute of limitations begins to run again at each sale. If so, this would practicably defeat the purpose of the statute of limitations.

See Garcia, 503 F.3d at 1096; *Taigen*, 303 F. Supp. 2d at 1144; *United States v. Hallmark Homes, Inc.*, No. CV01-432-N-EJL, 2003 WL 23219807 (D. Idaho Sept. 29, 2003). At that point, all design and construction decisions have been completed and the property can be lived in, whether in a sale or rental context. Regardless of what the courts ultimately utilize as an indicator of the date of completion, it is clear that *Garcia* and like courts have provided a more rational interpretation of the statute of limitations as applied to section 3604(f)(3)(C).

B. Many Courts Inappropriately Rely on *Havens* as Grounds for Applying the Continuing Violation Doctrine to Section 3604(f)(3)(C) allegations.

Equally troubling to *Amici* is the fact that certain courts, again relying primarily on *Havens*, have rendered the statute of limitations irrelevant by applying the continuing violation doctrine to Section 3604(f)(3)(C) claims. This reliance on *Havens* is misplaced. Although an FHA case where the Court upheld application of the continuing violation doctrine, the rationale of *Havens* is not properly applied in the context of section 3604(f)(3)(C). The alleged FHA violation in *Havens* was racial steering, a discriminatory act or practice that by definition continues over time. *Havens*, 455 U.S. at 380. Racial steering as a practice cannot be determined based on one event; rather racial steering is based on several events over time. *Id.* at 381. Hence, the Court found that the alleged racial steering constituted a continuing violation because (1) it continued to occur within the limitations period, and (2) the nature of racial steering is such that it is "manifested in a number of incidents." *Id.* In other words, the practice of racial steering can only be fully determined after looking at a series of alleged discriminatory acts.

Courts, including the Sixth Circuit, have inappropriately relied on *Havens* to apply the continuing violation doctrine to alleged design and construction violations. The Sixth Circuit, in finding that the discriminatory practice that triggers the statute of limitations is the sale or rental of a

dwelling, held that "the continuing violations doctrine applies to toll the statute of limitations until the sale of the last unit in a development." Pet. App. 33a. The court further held:

> where the plaintiff can show that the owner of several housing developments engaged in a continuous policy or practice with regard to the noncompliant design and construction of each of the developments, the continuing violation doctrine may toll the running of the limitations period until the last unit of all of the implicated developments is sold.

Id.

Yet, unlike racial steering, design and construction are discrete acts with a clear ending point—the date on which construction or design is completed for an individual unit. The Sixth Circuit failed to recognize that the Court in *Havens* indicated that there is a distinction between one-time events and continuing practices, holding that the continuing violation doctrine did not apply to the plaintiff tester's claims, which were based on "four isolated occasions" in which she received false information as to housing availability. *Havens*, 455 U.S. at 381. Accordingly, the rationale for applying the continuing violation doctrine in *Havens* should have no applicability to design and construction cases.

C. Applying the Continuing Violation Doctrine to Allegations of Design and Construction Violations Will Render the Statute of Limitations Meaningless.

Applying the continuing violation doctrine to alleged Section 3604(f)(3)(C) violations, as done by the Sixth Circuit, renders the statute of limitations "meaningless." *Kuchmas*, 2007 WL 2694186 at *5; *Moseke*, 202 F. Supp. 2d at 507, 508. In order to give full weight to the statute of limitations, the alleged continuing effects of the initial discriminatory act of design and construction cannot be

relevant to the triggering date. *See Moseke*, 202 F. Supp. 2d at 507.[6] Otherwise, as long as the building stands there is no relief from possible liability.

Both *Garcia* and *Kuchmas* provide authority issued since Petitioners filed their Petition that rejects the application of the continuing violations doctrine in Section 3604(f)(3)(C) cases. *See Garcia*, 503 F.3d at 1097; *Kuchmas*; 2007 WL 2694185 at * 5. They logically hold that the statute of limitations is triggered by the termination of the design and construction. *Id.* Because design and construction is a one-time event, application of the continuing violation doctrine is nonsensical. As the *Garcia* court held, the discriminatory practice, *i.e.* failure to design and construct in compliance with the FHA, "is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase." *Garcia*, 503 F.3d at 1097; *see also Kuchmas*, 2007 WL 2694186 at *4 (quoting *Moseke*, 202 F. Supp. 2d at 506). In sum, "[a]lthough the ill effects of a failure to properly design and construct may continue to be felt decades after construction is complete,

[6] This view is consistent with case law rejecting the application of the continuing violation doctrine where an effect is continuing but the defendant's act is not. *See Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991) (holding that "[a] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation"); *Tobert v. Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999) (holding that in a complaint alleging discriminatory allocation of sound barriers along the highway, the continuing lack of such barriers constituted a "continuing ill effect," and was not the result of continuing unlawful acts); *Perez v. Laredo Junior College*, 706 F.2d 731, 734 (5th Cir. 1983) (holding that even though the damages resulting from the denial of the claim for pay may have continued, the wrongful act itself did not and therefore did not constitute a continuing violation).

failing to design and construct is a single instance of unlawful conduct." *Id.* The statute of limitations, thus, runs from a discrete act not that act's ill effects.[7]

In finding the continuing violation doctrine inapplicable to FHA design and construction violations, the *Garcia* court accounted for one of the underlying purposes of the statute of limitations, which is "protect[ing] defendants from the burden of defending claims arising from . . . decisions that are long past." *Garcia*, 503 F.3d at 1099 (quoting *Del. State. College v. Ricks*, 499 U.S. 250, 256-57 (1980). *Amici* are concerned that if the continuing violation doctrine were to apply to FHA design and construction provisions, then "the FHA's statute of limitations would provide little finality for developers." *Id.* at 12721. Developers who retain their properties would be forever liable, while developers who sell their properties "would be required to repurchase and modify (or destroy) buildings containing inaccessible features in order to avoid design-and-construction liability for every aggrieved person who solicits tenancy from subsequent owners and managers." *Id.* As the Ninth Circuit logically reasoned, "[i]f Congress wanted to leave developers on the hook years after they cease having any association with a building, it could have phrased the statute to say so explicitly." *Id.*

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[7] This Court's precedent has also shown that a plaintiff cannot aggregate discrete acts of alleged discriminatory conduct into a series of related acts in order to apply the continuing violation doctrine. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (holding that "discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period"). Instead, "each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id.* In FHA design and construction cases, the design and construction of each unit or property is a discrete act.

To prevent the injustice and prejudice that results from the misapplication of the continuing violations doctrine based on *Havens* as precedent, this Court must decide this issue independently for FHA design and construction violations, and hold that it is inapplicable.

CONCLUSION

It is no exaggeration to assert that *Havens* has been misused and twisted by courts trying to squeeze their FHA design and construction discrimination claims into the *Havens* mold. In view of the wave of litigation by advocacy groups with no concrete or particularized injury beyond the costs they have unilaterally expended on testing, the Court must clarify the necessary elements for organizational standing. Organization standing cannot be demonstrated unless an organization has suffered and injury independent of the litigation the organization chooses to pursue. Similarly, *Havens* is inappropriate and distinguishable precedent for the statute of limitations issue and it is appropriate for this Court to hold with finality that the continuing violations doctrine does not apply to Section 3604(f)(3)(C) of the FHA.

For the all of the foregoing reasons, the Petition should be granted.

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Respectfully submitted,

Rafe Petersen
(Counsel of Record)
Christopher Hanback
Elizabeth Phelps
Holland and Knight LLP
2099 Pennsylvania Ave, NW
Washington, D.C. 20006
(202) 955-3000